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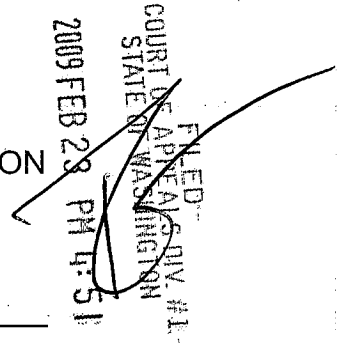

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

KEVIN DEAN,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR SKAGIT COUNTY

BRIEF OF APPELLANT
(With corrected citation to Clerk's Papers)

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A. SUMMARY OF ARGUMENT

Kevin Dean challenges his convictions of first degree theft and conspiracy to commit first degree theft. Mr. Dean contends the State violated the dictates of Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and deprived him of due process by failing to disclose information that the State's lead investigator knew of criminal acts of the alleged victim. Mr. Dean also contends the State failed to prove the elements of either offense beyond a reasonable doubt. Additionally, Mr. Dean argues the trial court erred in failing to grant a mistrial when the State's lead investigator commented on his right not to testify.

With respect to his exceptional sentence, Mr. Dean contends the trial court deprived him of his Fourteenth Amendment right to the equal protection of law by imposing a disproportionately harsher sentence on him as opposed to his more culpable codefendant.

B. ASSIGNMENTS OF ERROR

1. The State's failure to disclose material evidence denied Mr. Dean a fair trial and deprived him of due process.

2. The trial court erred in denying Mr. Dean's Motion for New Trial where the State failed to disclose material evidence.

3. The trial court erred in denying Mr. Dean's Motion for New Trial in the face of newly discovered evidence

4. In the absence of evidence to support each element, Mr. Dean's convictions deprived him of due process.

5. The trial court erred in denying a mistrial after the State adduced testimony commenting on Mr. Dean's right to remain silent and shifting the State's burden of proof.

6. Mr. Dean's sentence violates the Fourteenth Amendment Equal Protection Clause.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The Fourteenth Amendment of the United States Constitution requires the government disclose to the defense evidence which is material either as substantive or impeachment evidence. This obligation extends to those who are assisting the prosecution. The State's lead investigator did not disclose evidence of thefts by the alleged victim from the same corporation occurring at the same time as the allegations against Mr. Dean. Did the State fail to disclose material evidence?

2. Pursuant to CrR 7.5, a court may grant a new trial based on an irregularity in the prosecution which denies the defendant a fair trial or where newly discovered evidence would change the

outcome of trial. Where the State fails to disclose material evidence the defendant is denied a fair trial. Did the trial court err in failing to grant a new trial based on the State's concealment of material evidence until the defense's discovery of that evidence after trial?

3. The Fourteenth Amendment Due Process Clause requires the State prove each element of a crime charged. In its best light, the State's evidence established Mr. Dean was aware of fraudulent bookkeeping of codefendant Lisa Mullen, but did not establish Mr. Dean agreed to assist in that fraud or in any way benefited from the fraud. Was the evidence sufficient to convict Mr. Dean of first degree theft and conspiracy to commit first degree theft?

4. The State violates the Fourteenth Amendment's Due Process Clause when it adduces evidence relating to the defendant's choice to remain silent at trial and not to present a defense. Where the state's lead fraud investigator testified that he could not determine whether Mr. Dean or his codefendant benefited from any specific misposting in the books of the victim corporation but stated the defendants would know, did the State improperly adduce evidence commenting on Mr. Dean's exercise of his rights?

5. The Equal Protection Clause of the Fourteenth Amendment precludes sentencing similarly situated defendants differently in the absence of a rational basis to do so. Where the parties and trial court agreed Mr. Dean was substantially less culpable than his codefendant and where Mr. Dean was convicted of fewer offenses, was there any rational basis to nonetheless impose a substantially harsher sentence upon Mr. Dean as compared to his codefendant?

D. STATEMENT OF THE CASE

Ron Rennebohm purchased Frontier Ford in Anacortes in 1990. 1/18/06 RP 130. At the time of Mr. Rennebohm's purchase, Lisa Mullen was employed in the bookkeeping department of the dealership and soon Mr. Rennebohm made her the comptroller. 1/18/06 RP 132. Mr. Dean was hired as the dealership's general manager in 1996. Richard Rekdal, and his firm Clothier and Head, were retained as both Frontier Ford's accountant as well as Mr. Rennebohm's personal accountant beginning in the early 1990's.

Every employee at Frontier Ford had an account receivable which allowed them to take preauthorized draws on their salaries or in some instances loans from the dealership. 1/9/06 RP 91; 1/18/06 RP 172. The account balances were then deducted from

subsequent salary. 1/21/06 RP 91. In June 2002, Mr. Rennebohm contacted Anacortes Police alleging Ms. Mullen had stolen hundreds of thousands of dollars from Frontier Ford. 1/5/06 RP 71. Despite the amounts allegedly involved, Mr. Rennebohm urged police to wrap up their investigation in a matter of days and simply arrest Ms. Mullen. 1/5/07 RP 79.

In their most basic form, the alleged thefts concerned Ms. Mullen using draws from her own account receivable, as well as those of other current and former employees, to purchase nonbusiness items for personal use. Through the machinations of the bookkeeping process, Ms. Mullen was then able to "pay off" the debts reflected in the accounts receivable by transferring funds from other accounts within Frontier Ford's ledger, but without ever actually paying money back to Frontier Ford. Given the fact that Frontier Ford's annual sales totaled nearly $80 million dollars, Ms. Mullen's mispostings within the ledger went unnoticed for years, even as the accumulated misstatements surpassed $1,200,000. 1/25/06 RP 82, 181

Because the Anacortes Police Department did not have the ability to investigate such complex allegations of fraud, the Skagit County Prosecutor elected to retain Mr. Rekdal to investigate the

allegations. 1/5/07 RP 87; 1/30/06 RP 94-95. Despite working on behalf of the prosecutor's office, Mr. Rekdal and his firm continued to act as Frontier Ford and Mr. Rennebohm's personal accountant. 1/26/06 27-30; 1/27/06 RP 46. During the course of the investigation, Mr. Rekdal learned that over the course of years Mr. Rennebohm had underreported a substantial amount of corporate and personal income, between $250,000 and $1,000,000, had used corporate funds to pay off personal loans, and had failed to pay state or federal taxes on any of those funds. CP 1262-75. Despite the fact that he was at that time retained by the Skagit County Prosecutor's office, Mr. Rekdal did not reveal the information to the parties in the present matter. CP 1266. The full extent of Mr. Rekdal's nondisclosure is discussed in greater detail in the arguments that follow.

The vast majority of questionable transactions in Frontier Ford's books were posted by Ms. Mullen personally, and the remainder were done by the bookkeeping staff whom she supervised. 1/27/06 RP 77. Mr. Dean did not write a single check or make a single inappropriate transfer or posting in Frontier Ford's book. Unlike the hundreds of thousands of dollars of purchases traced directly to Ms. Mullen by receipts, checks, and even pictures,

the State did not offer a single transaction traceable to Mr. Dean. See 1/8/06 RP 180 (testimony regarding Ms. Mullen writing checks to herself and debiting amount to Mr. Dean's account receivable); 1/9/06 RP 15-23 (detailing Ms. Mullen's purchase of more than $33,000 in jewelry in 20 month period); 1/11/06 RP 169-75 (detailing Ms. Mullen's purchases of Doncaster clothing totaling nearly $32,000 in a seven month period); 1/11/06 RP 181-84 (detailing Ms. Mullen's purchases of stuffed toy rabbits from Bunnies by the Bay totaling $19,622); 1/13/06 RP 140-50 (detailing Ms. Mullen's purchases at St John Boutique totaling nearly $75,000 over four months), 1/17/06 RP 34 (detailing single purchase of jewelry by Ms. Mullen totaling $17,500).

Ms. Mullen testified the mispostings which were at the heart of the state's case were done with Mr. Rennebohm's knowledge and approval. 1/31/06 RP 120; 2/1/06 RP 42 Ms. Mullen testified the postings were designed to "hide the profits" of Frontier Ford from Mr. Rennebohm's business partner, Ragnar Pettersson. 1/31/06 RP 160. By reducing the reported profits, the postings decreased the salaries of managers (such as Mr. Dean) whose pay was in part determined as a percentage of profit. 1/31/06 RP 161-62. In return for her involvement, Mr. Rennebohm provided her

numerous and expensive gifts purchased by Frontier Ford. 1/31/06 RP 163.

A large portion of Mr. Dean's salary was determined based upon the dealership's monthly sales, his salary fluctuated significantly from month to month depending on monthly sales. Because Mr. Dean was then going through a divorce and needed a predictable monthly pay from which to calculate child support, Ms. Mullen testified that at the direction of Mr. Rekdal and with Mr. Rennebohm's knowledge, she created an accrued salary account for Mr. Dean in which, after paying Mr. Dean a predetermined amount each month in salary, she deposited his surplus monthly income. 1/29/06 RP 65-68; 1/31/06 RP 127-28. Ms. Mullen testified she ceased using the account for that purpose in 1999 at the direction of Mr. Rekdal because of potential tax liabilities arising from the accrued salary structure. 2/1/06 RP 43-45. Ms. Mullen testified that without Mr. Dean's knowledge, she continued to use that account, which still bore Mr. Dean's name, to launder money from her other activities. 2/1/06 RP 44-45. Mr. Rekdal confirmed that numerous postings in this second account were for checks written to and endorsed by Ms. Rennebohm and for items purchased by Ms. Mullen. 1/27/06 RP 82.

Numerous witnesses testified that Mr. Dean and Ms. Mullen had a romantic relationship at some point in time while both were employed at Frontier Ford. 1/6/06 RP 151; 1/13/06 RP 47.

Mr. Dean was charged with one count each of first degree theft, conspiracy to commit first degree theft, and criminal profiteering. CP 542-52. At the close of the State's case, the trial court dismissed the profiteering count against Mr. Dean, but while noting the paucity of evidence on the remaining counts refused to dismiss them. 1/31/06 RP 54.

Following a trial in January and February 2006, a jury convicted Mr. Dean of both the remaining theft and conspiracy charges. CP 1030-31. Following the jury's verdict Mr. Dean stipulated the facts presented at trial established the crimes were a major economic offense. CP 1032.

In the weeks following the verdict, Mr. Dean obtained copies of documents filed in a lawsuit brought by Mr. Rennebohm against Clothier and Head. 5/19/06 RP 5. In particular, the documents for the first time revealed Mr. Rekdal was aware, at least two years before trial, of Mr. Rennebohm's embezzlement and tax evasion. 5/19/0612. The documents revealed that immediately following his

trial testimony, Mr. Rekdal had significant doubts in the truth of Mr. Rennebohm's claim's of ignorance of the alleged thefts.

Based on this information Mr. Dean filed a motion for new trial alleging the State had violated Brady by failing to disclose evidence known to its investigator. CP 1188. The trial court denied the motion, concluding the State's obligation did not extend beyond information known to the prosecutor himself. CP 1279-1280.

The court imposed an exceptional sentence of 30 months. CP 1283-94.

E. ARGUMENT

1. THE STATE DEPRIVED MR. DEAN OF DUE PROCESS BY FAILING TO DISCLOSE MATERIAL EVIDENCE

Mr. Rekdal testified to the jury that as a result of Mr. Dean and Ms. Mullen's acts money left Frontier Ford and that those transactions were not authorized by Mr. Rennebohm. One week later, Mr. Rekdal stated during a deposition in a lawsuit filed in King County Superior Court against his firm by Mr. Rennebohm that while he was certain money left Frontier Ford, he could no longer say that it was unauthorized. During the course of that same lawsuit, Mr. Rekdal stated in declarations and depositions that he learned during his investigation on behalf of the Skagit County

Prosecutor's Office Mr. Rennebohm had failed to report in his federal tax filings between 1999 and 2003 at least $150,000 in corporate income and that this amount could be as high as $1,000,000.

Although Mr. Rekdal discovered this information during the investigation, the information was not revealed to Mr. Dean. In fact, Mr. Dean only learned of this information after his conviction when it was inadvertently provided to him at the King County Superior Court Clerk's office (the court proceedings had been sealed but were inadvertently provided to Mr. Dean).

The failure to disclose this evidence violates the requirements of Brady, 373 U.S. at 87.

a. Due process requires the government to disclose material evidence. The Due Process Clause of the Fourteenth Amendment guarantees a criminal defendant the right to a fair trial and a meaningful opportunity to present a defense. U.S. Const. amend. XIV; California v. Trombetta, 467 U.S. 479, 485, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984); State v. Wittenbarger, 124 Wn.2d 467, 474-75, 880 P.2d 517 (1994). Due process requires the government disclose to a defendant material evidence. Brady v. 373 U.S. at 87. This requires the government disclose to a

defendant all exculpatory or impeachment evidence whether it is requested or not. Brady, 373 U.S. at 87; see also Strickler v. Greene, 527 U.S. 263, 280, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999); United States v. Bagley, 473 U.S. 667, 676, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985).

> There are three components of a Brady violation:
>
> (1) The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; (2) that evidence must have been suppressed by the State, either willfully or inadvertently; and (3) prejudice must have ensued.

Strickler, 527 U.S. at 281-82.

Non-disclosed evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Bagley, 473 U.S. at 682. More specifically, the Court has emphasized four points regarding this test of materiality. First,

> although the constitutional duty is triggered by the potential impact of favorable but undisclosed evidence, a showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal.

Kyles v. Whitley, 514 U.S. 419, 434, 115 S.Ct. 1555, 131 L. Ed. 2d 490 (1995). Thus,

> [t]he question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A "'reasonable probability' of a different result is accordingly shown when the government's evidentiary suppression undermines confidence in the outcome of the trial."

(Emphasis added.) Id. at 434 (quoting Bagley, 473 U.S. at 678).

Second, sufficiency of the evidence is not the touchstone of materiality: "A defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict." Kyles, 514 U.S. at 434-35. Third, once constitutional error has been established there is no need for harmless error review, since

> a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different . . . necessarily entails the conclusion that the suppression must have had substantial and injurious effect or influence in determining the jury's verdict.

Id. at 435. Fourth, in determining materiality, the "suppressed evidence [is] considered collectively, not item by item." Id. at 437.

The State failed to disclose material evidence to Mr. Dean.

b. The government's obligations under *Brady* extend to its investigators and other members of the prosecution team.

The Brady rule encompasses evidence beyond that actually known

by the prosecutor because "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in this case, including the police." Kyles, 514 U.S. at 437; see also, United States v. Hsieh Hui Mei Chen, 754 F.2d 817, 824 (1985).

In the present case, Mr. Rekdal acknowledged he had withheld information, learned in the course of his investigation, regarding Mr. Rennebohm. CP 1266. Mr. Rekdal explained he did so because his professional duty to Mr. Rennebohm and potential criminal penalties against himself prevented him from doing so. Id. But whatever his reason for doing so, there is no question that information was suppressed. The only question is whether the State's obligation under Brady included information known by Mr. Rekdal.

Mr. Dean cited Kyles to the court, CP 1188, and Kyles plainly applies the Brady obligation "to others acting on the government's behalf." 514 U.S. at 437. Nonetheless, the trial court concluded that Brady was not violated because the prosecutor was not aware of the information and "no authority cited supports [the] proposition" that Mr. Rekdal's nondisclosure implicates Brady. CP 1279.

Indeed, Mr. Rekdal was an integral, if not the central, component of the prosecution team. Anacortes Police Detective Emerson Nordmark testified his department made the decision early in this case that it lacked the resources and expertise to conduct the financial investigation required. 1/5/06 RP 87; 1/30/06 RP 94. Detective Nordmark's desire to seek the investigative assistance of the Attorney General's Office was vetoed, either by his superiors in the police department or by the prosecutor's office, in favor of relying on Mr. Rekdal and his firm to investigate the matter. 1/30/06 RP 94-95. The police role was limited to gathering information requested by Mr. Rekdal and supplying it to him. 1/30/06 RP 94. Mr. Rekdal's investigation was directed by the prosecutor. 1/25/06 RP 53-55. Following Mr. Dean's conviction the State submitted a cost bill seeking reimbursement for "accounting fees for investigation" billed by Mr. Rekdal and his firm in the amount of $230,389.76. CP 1059-69.

Finally, Mr. Rekdal stated he discovered Mr. Rennebohm's own embezzlement while assisting in the State's investigation. CP 5701, ¶26. Mr. Rekdal stated he learned of the fraud while "up there investigating" the allegations against Mr. Dean and Ms. Mullen. CP 6514 (Deposition p155).

In light of the record and Mr. Rekdal's own understanding of his role, the State cannot seriously dispute that Mr. Rekdal was "acting on the government's behalf" in this case. Thus, the requirements of Brady extended to information he possessed. Kyles, 514 U.S. at 437.

It cannot matter for purposes of Brady that Mr. Rekdal withheld information from the prosecutor as well as the defense. If there were merit to that distinction Brady could be avoided by the purposeful, or merely negligent, ignorance of the prosecutor.

> Exculpatory evidence cannot be kept out of the hands of the defense just because the prosecutor does not have it, where an investigating agency does. That would undermine Brady by allowing the investigating agency to prevent production by keeping a report out of the prosecutor's hands until the agency decided the prosecutor ought to have it, and by allowing the prosecutor to tell the investigators not to give him certain materials unless he asked for them.

United States v. Zuno-Acre, 44 F.3d 1420, 1427 (9th Cir.), cert. denied, 516 U.S. 945 (1995). Such a rule:

> boils down to a plea to substitute the police [or other investigating agency] for the prosecutor, and even for the courts themselves, as the final arbiters of the government's obligation to ensure fair trials.

Kyles, 514 U.S. at 438.

The trial court's ruling provides:

> It was, or should have been, apparent to both the State and the defense from day one that there was potential for conflict and mischief in the Rennebohm/Rekdal relationship. The parties were aware early on of the fact of other litigation involving these important witnesses . . . . No one should be surprised or shocked by the information brought to the court's attention in these post-trial motions.

CP 1279.

The fact that the State chose to employ an investigator who at the time of his hiring had, at a minimum, a potential conflict of interest, and who had some point had an actual conflict of interest, does not insulate the State and its investigator from the dictates of Brady. It would be a curious exception to Brady to excuse the nondisclosure of evidence of the government's malfeasance simply because such malfeasance is predictable. Mr. Dean had no ability to demand the State use one investigator over another. The prosecutor alone controlled the decision of who investigated the case. See, 1/30/06 RP 94-95 (Detective Nordmark testifying that contrary to his wishes case was not referred to Attorney General's Office for investigation). If one party must bear the brunt of the constitutional violation, it must be the party who had the ability to avoid it; the State.

Ignoring Mr. Dean's inability to object to the choice of investigators, the waiver of a constitutional right must be knowing, voluntary and intelligently made. Johnson v. Zerbst, 304 U.S. 458, 464-65, 58 S.Ct. 1019, 82 L.Ed 1461 (1938). It was not the existence of a potential conflict that violated Brady in this case, instead due process was offended when that potential conflict evolved into an actual conflict. Mr. Dean was not aware of that occurrence until long after it arose in 2004. Nor could he have known sooner, as it was the very existence of the actual conflict which kept Mr. Rekdal from disclosing how the conflict arose; i.e., Mr. Rekdal's professional duty to Mr. Rennebohm as a client precluded him from disclosing Mr. Rennebohm's fraud to his client, the Skagit County Prosecutor. CP 1266. In fact the only reason that information came to light at all is because a clerk at the King County Superior Court failed to block access to the documents. The fact that a predictable result flowed from a decision by the prosecutor, which he alone controlled, does not lessen the constitutional damage, it merely underscores the shortsightedness of the initial decision.

Because Mr. Rekdal was acting on the government's behalf, information in his possession was subject to Brady. Kyles v. Whitley, 514 U.S. at 437.

c. The Government withheld material evidence from Mr. Dean. Mr. Rekdal readily admitted he withheld information, CP 1266, and as set out above, that information should have been disclosed. Thus, the remaining question is whether that information was material. As argued below, the withheld information was material in three respects. First, the information corroborated Ms. Mullen's testimony that she and Mr. Rennebohm were diverting income from Frontier Ford, without Mr. Dean's knowledge or involvement. Second, the information contradicted Mr. Rennebohm's testimony that the takings were unauthorized and contradicted his claims that the alleged theft, as opposed to his own acts, placed the corporation in dire financial condition. Finally, the fact that Mr. Rekdal withheld information from a client, the prosecutor, whom he continued to represent for more than two years despite the existence of that conflict was relevant to his credentials as an expert, to the thoroughness of his investigations and ultimately to his credibility as a witness.

Examining the withheld evidence in its entirety, the State's failure to disclose the evidence undermines confidence in the outcome of the trial. The hallmark of the right to present a defense is the right to "require the prosecutor's case to survive the crucible of meaningful adversarial testing." See Cronic v United States, 466 U.S. 648, 656, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). This cannot occur where the State withholds material evidence.

i. There was little evidence establishing Mr. Dean's guilt. While acquittal is not the touchstone of materiality, it is worth noting the evidence against Mr. Dean was far from overwhelming. The vast majority of questionable transactions in Frontier Ford's books were posted by Ms. Mullen personally, and the remainder were done by the bookkeeping staff whom she supervised. 1/27/06 RP 77. Mr. Dean did not write a single check or make a single inappropriate transfer or posting in Frontier Ford's book. Unlike the hundreds of thousands of dollars of purchases traced directly to Ms. Mullen, by receipts, checks, and even pictures, the State did not offer a single transaction traceable to Mr. Dean. See 1/11/06 RP 169-75 (detailing Ms. Mullen's purchases of Doncaster clothing totaling nearly $32,000 in seven month period); 1/11/06 RP 181-84 (detailing Ms. Mullen's purchases at Bunnies by

the Bay totaling $19,622); 1/13/06 RP 140-50 (detailing Ms. Mullen's purchases at St John Boutique totaling nearly $75,000 over four months).

On three occasions, the trial court noted the relative weakness of the State's case against Mr. Dean as opposed to Ms. Mullen. At the close of the State's case, the trial court dismissed the criminal profiteering charge against Mr. Dean, and while it allowed the remaining counts to go to the jury the court stated the evidence was largely circumstantial and "is [not] something that jumps out at me." 1/31/06 RP 54. Again at sentencing, the court noted it was clear that Ms. Mullen had benefited substantially more than Mr. Dean. 12/11/06 RP 41. Finally, even in denying Mr. Dean's motion for new trial, the court noted "Mr. Dean's motion in arrest or to vacate was a closer call because of the nature of the evidence against him." CP 1280. Thus, even though the materiality requirement of Brady does not require Mr. Dean demonstrate he would have been acquitted, the paucity of the evidence against him most be remembered in assessing the nature and impact of the evidence withheld.

The case against Mr. Dean consisted largely of detailing the mispostings and unauthorized expenditures by Ms. Mullen,

demonstrating the misposting in Mr. Dean's account, and then urging the jury to infer Mr. Dean's knowledge and involvement based upon his role as general manager and his romantic relationship with Ms. Mullen. The same, however, could be said of Mr. Rennebohm, save for the romantic relationship. Hundreds of thousands of dollars were improperly posted in and transferred out of his account, 1/25/06 RP 162, and one could surmise the owner of a business has some knowledge of its financial dealings. Although the State's evidence affirmatively established each and every questionable posting was done by Ms. Mullen, the State argued Mr. Dean must have known of the transactions because they involved postings to his account, all the while ignoring Mr. Rennebohm's claimed lack of knowledge despite precisely the same type of activity in his own account. The decision to treat Mr. Dean and Mr. Rennebohm differently stemmed from one fact alone; Mr. Rennebohm's assertion to his longtime accountant that he was unaware of the activity in his account. 8/27/04 RP 84; 1/25/06 RP 156.

Contrary to this explanation at trial, Mr. Rekdal stated in his subsequent deposition the "majority of nonbusiness activity in Mr. Rennebohm's account receivable benefited Mr. Rennebohm." CP

6567 (Deposition p 256); compare 1/25/06 151-52, 154 (activity not to Mr. Rennebohm's benefit). Mr. Rekdal's testimony in his deposition, withheld at trial, that Mr. Rennebohm benefited from the majority of activity in his account undercut the State's basic argument; eliminating any claimed distinction between Mr. Dean's supposed knowledge and Mr. Rennebohm's feigned ignorance.

On February 7, 2006, one week after he completed his testimony at trial, Mr. Rekdal stated during his deposition that he had testified at the trial that money had left Frontier Ford and this was done without the authorization of Mr. Rennebohm. CP 6564 (Deposition p 245). Mr. Rekdal then stated that despite his recent trial testimony, while he was certain money had left the corporation he could no longer say it was done without Mr. Rennebohm's authorization. CP 6564-65 (Deposition pp 245-48). When asked if he had shared his doubts with the prosecutor, Mr. Rekdal responded "he hasn't asked." CP 6564 (Deposition p 246). The exclusion of this information by the State's principal investigator, made under oath on the same day the case was submitted to the jury, substantially undermines confidence in the jury's verdict. Had Mr. Rekdal expressed similar hesitancy at trial, the State's proof

that Mr. Dean committed theft, weak as it already was, would have evaporated.

ii. The withheld information corroborated the defense case. Ms. Mullen testified the mispostings which were at the bottom of the state's case were done with Mr. Rennebohm's knowledge and approval. 1/31/06 RP 120; 2/1/06 RP 42. Ms. Mullen testified the postings were designed to "hide the profits" of Frontier Ford from his business partner Ragnar Pettersson. 1/31/06 RP 160. By reducing the reported profits, the postings decreased the salaries of managers (such as Mr. Dean) whose pay was in part determined as a percentage of profit. 1/31/06 RP 161-62. In return for her involvement in this scheme, Ms. Mullen testified Mr. Rennebohm provided her numerous and expensive gifts purchased by Frontier Ford. 1/31/06 RP 163. Ms. Mullen testified bluntly that Mr. Dean was in no way involved with the mispostings. Ms. Mullen explained that in 1999 because of tax concerns expressed by Mr. Rekdal she ceased using Mr. Dean's second account for his accrued pay. 2/1/06 43-44.

Ms. Mullen testified that at Mr. Rennebohm's direction she employed bookkeeping measures to reduce the reported corporate income. In that pursuit, Ms. Mullen regularly posted items to Mr.

Dean's second account without his knowledge, to post entries relating to purchases she and Mr. Rennebohm were making. 2/1/06 RP 44-45. Mr. Rekdal confirmed that numerous postings in this second account were for checks written and endorsed by Ms. Rennebohm and for items purchased by Ms. Mullen. 1/27/06 RP 82. Mr. Dean was unaware of this activity. 2/1/06 RP 45.

Ms. Mullen explained one particular example of her and Mr. Rennebohm's efforts to underreport income. Ms. Mullen explained Frontier Ford sold extended warranties offered by Payment Insured Plan Inc. (PIPI). For each plan sold, PIPI allowed the dealer to inflate the cost of the warranty by set a amount (Ms. Mullen testified it was $125, Mr. Rekdal's deposition says $100). That amount was then returned to PIPI to repay loans provided to the dealer. 2/1/06 RP 27-28. Mr. Rennebohm had previously received several hundreds of thousands of dollars in loans from PIPI, which were not reported as income on Frontier Fords books. Frontier Ford listed the full inflated cost of the extended warranties as expenses, despite the fact that Mr. Rennebohm was using the kickback to pay off his personal loans. 2/1/06 RP 27-29. In other words he was using corporate money to pay personal debts and not paying taxes on either the loans or kickbacks.

In his deposition, but withheld at trial, Mr. Rekdal stated that during his investigation for the Skagit County Prosecutor he discovered Mr. Rennebohm had indeed failed to report a minimum of $150,000 and as much as $1,000,000 in income and interest in loans from PIPI as well as the kickbacks he used for repayment. CP 6514-15 (Deposition pp154-158). Moreover, Mr. Rekdal asserted he discovered Mr. Rennebohm's account receivable was reduced in an amount equal to the loan payments being made. CP 5575-76 ¶3.

The State's was quite dismissive of Ms. Mullen's characterization of Mr. Rennebohm as a crook. 2/106 RP 85-86, 119. Of course the facts withheld by the government indicated Mr. Rennebohm was in fact a crook. That information established that Mr. Rennebohm was not reporting substantial income, thus failing to pay state and federal taxes, denying his partner his proper share of the corporate earnings, and underpaying the dealership's managers whose salary was in part determined by a percentage of the profits. The withheld information was material as it corroborated the defense case

ii. The withheld evidence impeached Mr. Rennebohm. The withheld information undercut Mr. Rennebohm's

effort to portray himself as a hapless victim preyed upon by those he had trusted. Mr. Rennebohm testified he had dropped out of high school and began in the car industry as a lot boy, moving cars on a sales lot. 1/18/06 RP 121-22. Despite the fact that he translated those humble beginnings into ownership of at least three separate dealerships, one of which was generating as much as $9,500,000 in monthly sales, 1/18/06 RP 149, Mr. Rennebohm testified he is in all respects financially illiterate, completely unable to read so basic a document as a corporate financial statement. 1/18/06 RP 162; 1/19/06 RP 155. Darla Rennebohm even claimed, notwithstanding her husband's obvious success, he couldn't even read a profit and loss statement. 1/17/06 RP 158. Instead, in what must be the antithesis of an Horatio Alger tale, Mr. Rennebohm claimed he succeeded despite himself, relying wholly on the skills and magnanimity of others to earn his millions. Mr. Rennebohm stated at various points he relied on the skills of Mr. Dean and Ms. Mullen to run Frontier Ford and Mr. Rekdal to monitor the financial health of his holdings. 1/18/06 RP 163-64, 217.

The relative complexity of Mr. Rennebohm's scheme undercut his self-portrayal and bolstered evidence of his knowledge of Ms. Mullen's transactions. The information would have recast

Mr. Rennebohm as a calculating individual willing to misrepresent himself where there were direct benefits to doing so, such as overstating Mr. Rekdal's role in the day-to-day business of Frontier Ford so as to improve his position in his professional negligence lawsuit against Mr. Rekdal. Compare e.g., 1/18/06 RP 217(Rennebohm testifying he hired Clothier and Head to "be my eyes and ears") and 1/24/06 RP 39 (Rekdal testifying Clothier and Head were limited to preparing tax returns for Frontier Ford and Rennebohm and occasional special projects).

When asked during his deposition if there was a connection between Mr. Rennebohm's failure to report income and the allegations against Mr. Dean and Ms. Mullen, Mr. Rekdal invoked the attorney client privilege. CP 6517 (Deposition p.169). A jury hearing of that invocation could have properly speculated that Mr. Rennebohm's fraud was indeed related to the allegations against the defendant; that it was as described by Ms. Mullen in her trial testimony; and that the activity was authorized.

At trial, the jury heard Mr. Rennebohm previously acknowledged that during his divorce from his former wife, he signed a false note giving one of his shares in Bellevue Cadillac to his then partner Ragnar Pettersson, in an effort to reduce Mr.

Rennebohm's ownership interest and protect the dealership from his wife in their property settlement. 1/19/06 RP 110-16. In his testimony, however, Mr. Rennebohm would not admit he signed the false note or even that there was a false note but only that he testified to that version of events in a lawsuit between himself and Mr. Pettersson. 1/19/06 RP 107.

In his deposition the day after he completed his trial testimony, Mr. Rekdal shared that Mr. Rennebohm knew the note he had signed in favor of Ragnar Pettersson was invalid. CP 6523 (Deposition p.193). Mr. Rekdal stated had never shared that knowledge prior to the deposition. Id. Although he was subpoenaed to testify at trial in the case between Mr. Rennebohm and Mr. Peterson, Mr. Rekdal did not do so invoking some unidentified privilege. CP 6525 (Deposition p198-99). Because his lead investigator was withholding such information, the deputy prosecutor at trial moved to preclude questioning of Mr. Rekdal regarding the false note asserting "I don't think [Mr. Rekdal] has any personal knowledge of the note we are talking about." 1/26/06 RP 75. The court agreed there was no relevance to such questioning. Of course, as his deposition made clear, Mr. Rekdal did have knowledge of the fake note and did have knowledge that

Mr. Rennebohm knew it was fraudulent, he had simply suppressed that information.

Mr. Rennebohm testified during trial that in 2001 he made a personal loan to Frontier Ford because it was experiencing cash flow problems. 1/18/06 RP 211. Mr. Rennebohm stated he thought it was odd that there was drain on cash despite the regular profits the dealership was then generating, plainly implying it was a product of Ms. Mullen and Mr. Dean's alleged improprieties. 1/18/06 RP 212. Though he did not share as much at trial, Mr. Rekdal stated in a declaration in the civil suit that the cash flow problems in 2001 were the result of Mr. Rennebohm taking money out of the corporation. CP 5686-90.

Because it impeached Mr. Rennebohm's testimony and undercut the State's theory of the case, the withheld evidence was material.

iv. The withheld evidence impeached Mr. Rekdal. The information withheld by Mr. Rekdal undercut his own testimony that he ended his representation of Frontier Ford solely because Mr. Rennebohm's constant involvement in litigation was a drag on his work for other clients. 1/27/06 RP 57. While this was apparently part of the decision, the principal basis was his

discovery of Mr. Rennebohm's potential criminal acts. CP 6575 (Deposition pp 284-86). Armed with the withheld information, the jury may well have concluded Mr. Rekdal was seeking to distance himself from any potential professional or criminal sanctions resulting from his preparation of Mr. Rennebohm's federal tax return during the period in which Rennebohm was not reporting substantial income.

Finally, the mere fact that Mr. Rekdal chose to withhold from his client, the prosecutor's office, the existence of an actual conflict of interest with a former client is a material fact which the jury should been permitted to consider in conjunction with the State's offer of Mr. Rekdal's credentials as a certified public accountant. In closing argument the prosecutor posed the question to the jury "What evidence do you have to show that Clothier and Head or Rick Rekdal are involved in an accounting scandal?" 2/6/06 RP 113. In fact, such evidence existed but had been withheld from the defense and the jury.

Because the withheld evidence impeached Mr. Rekdal's testimony it was material.

v. Reversal is required. The court's written ruling states

> [the] jury carefully followed all aspects of the trial, listened to Messrs Rennebohm and Rekdal tell their side of the story, listened to Ms. Mullen trash the main witnesses for the State. The jury could easily have concluded, consistent with the position of the defense that Rennebohm and Rekdal conspired to cheat the government, former partners, and a whole number of others . . . . The Court allowed broad impeachment. . . . . Regardless the jury chose not to find for the defense.

The State's own investigator knew Ms. Mullen was right; Mr. Rennebohm was cheating others and committing tax fraud. The jury never heard that from the State's witnesses. As easy as it would have been for the jury to believe the defense, it would have been substantially easier when the State confirmed the correctness of that testimony. The withheld evidence was material and reversal is required.

2. THE TRIAL COURT ERRED IN DENYING MR. DEAN'S MOTION FOR A NEW TRIAL

a. CrR 7.5 permits a court to grant a new trial. CrR 7.5(a) provides in part:

> The court on motion of a defendant may grant a new trial for any one of the following causes when it affirmatively appears that a substantial right of the defendant was materially affected:
> . . .
> (3) Newly discovered evidence material for the defendant, which he could not have discovered with reasonable diligence and produced at trial;
> . . .

> (5) Irregularity in the proceedings of the court, jury or prosecution, or any order of the court, . . . by which the defendant was prevented from having a fair trial;
> . . . .

The denial of a motion for new trial is a matter left to the trial court's discretion. State v. Williams, 96 Wn.2d 215, 220, 634 P.2d 868 (1981).

In addition to the Brady violation, Mr. Dean's motion asserted the court should grant a new trial because the evidence withheld constituted "newly discovered evidence" pursuant to CrR 7.5(a)(3). CP 1193. The trial court denied the motion concluding the information was available to the defense prior to trial and was not material. CP 1279. As set forth below, the trial court abused its discretion in denying Mr. Dean's motion for a new trial.

b. The trial court abused its discretion in denying the motion for new trial. Mr. Dean was entitled to a new trial pursuant to CrR 7.5(a)(5). As discussed at length above, the State violated Brady. As set forth previously, where the State violates Brady, the defendant is denied a fundamentally fair trial. See, e.g., Wittenbarger, 124 Wn.2d at 474-75. Moreover, a Brady violation is necessarily an irregularity in the prosecution.

Beyond its constitutional dimension, newly discovered evidence warrants a new trial where it:

> (1) will probably change the result of the trial; (2) was discovered since the trial; (3) could not have been discovered before trial by the exercise of due diligence; (4) is material; *and* (5) is not merely cumulative or impeaching.

(Emphasis in original.) State v. Jackman, 113 Wn.2d 772, 779, 783 P.2d 580 (1989) (citing Williams, 96 Wn.2d at 223)). The evidence in this case was of this character.

The evidence was discovered post trial, as Mr. Rekdal never shared his knowledge of Mr. Rennebohm's fraud, and had never shared his opinion that Mr. Rennebohm may have authorized the mispostings in Frontier Ford's books. If not for a mistake by the King County Clerk's office this information would have never been discovered. The evidence in this case was not merely impeaching, although it was certainly that as well. Instead the evidence provided substantial corroboration of Ms. Mullen's testimony, and thereby was substantive evidence of Mr. Dean's innocence. Additionally, as discussed above, in light of the dearth of evidence against Mr. Dean, evidence which provided such strong corroboration of Ms. Mullen's testimony, and thereby of his innocence, was material. Thus, the only question is whether the

evidence could have been discovered prior to trial. Contrary to the court's ruling the answer must be no.

Despite the fact that he was employed by the Skagit County Prosecutor at the time he discovered the evidence, Mr. Rekdal chose to withhold the information from his client for more than two years, and apparently would have continued to do so but for its inadvertent discovery. In light of his willingness to withhold the information from a client who was paying him nearly a quarter of a million dollars precisely to investigate the books of Frontier Ford, there can be no reason to expect Mr. Rekdal would have ever disclosed that information to the defendants no matter how hard they tried to find it.

Nor could the information have been obtained through Mr. Rennebohm. Even in the civil suit Mr. Rekdal and his firm obtained sanctions against Mr. Rennebohm for his failure to provide the PIPI information he had. CP 5971. Mr. Rennebohm responded to the imposition of sanctions by claming he had not retained copies of loan documents. Supp CP 6182-84. In light of this, there is no basis on which to conclude defense counsel could have discovered the information, because according to Mr. Rennebohm much of it no longer existed.

Finally, Mr. Dean could not have discovered prior to trial that Mr. Rekdal was uncertain whether the taking was unauthorized. Mr. Rekdal testified at trial under oath and never expressed any hesitancy, this despite knowing for at least two years what Mr. Rennebohm had done. Only in the weeks following his testimony did Mr. Rekdal express his doubts. In light of his willingness to state with certainty his opinion under oath despite the doubts which must have been present, there is no basis to conclude he would have shared those doubts with the defendants prior to trial.

The evidence withheld by the state warranted a new trial. This Court should reverse the trial court's ruling.

3. THE STATE FAILED TO PRESENT SUFFICIENT EVIDENCE FROM WHICH TO CONVICT MR. DEAN OF EITHER COUNT.

a. Due process required the State prove each element of the offense beyond a reasonable doubt. In a criminal prosecution, the Fourteenth Amendment Due Process Clause requires the State prove each essential element of the crime charged beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Evidence is sufficient only if, in the light most favorable to the

prosecution, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

b. The State did not prove Mr. Dean committed either first degree theft or conspiracy to commit first degree theft. The State did not prove Mr. Dean made a single posting or wrote a single check taking money from Frontier Ford. Instead, every questionable posting was made by Ms. Mullen or the bookkeeping staff she supervised.

The State was able to offer mountains of receipts, cancelled checks and other records detailing Ms. Mullen's use of Frontier Ford money to buy things such as jewelry, clothes, and stuffed rabbits. The State was able to offer photographs of Ms. Mullen wearing some of those items. The State was even able to demonstrate the resale of some of these items by Ms. Mullen on eBay. But the State could not point to a single item purchased by Mr. Dean with Frontier Ford's money.

What the State proved was Mr. Dean was the general manager, responsible for the day-to-day operations at Frontier Ford, and that he had at one time had a romantic relationship with the comptroller who admitted making erroneous bookkeeping

entries. The State proved that many of these entries were made in Mr. Dean's account, and that checks were drawn off those accounts. But the State did not prove that Mr. Dean ever received money or anything of value in excess of what he was owed by the dealership. Indeed, the State's proof established identical activity in Mr. Rennebohm's account and yet he was never charged him with theft.

At best the State established Mr. Dean's knowledge of Ms. Mullen's activities. Knowledge of another's criminal activities is insufficient to prove complicity in those crimes.

> One does not aid and abet unless, in some way, he associates himself with the undertaking, participates in it as in something he desires to bring about, and seeks by his action to make it succeed. State v. Gladstone 78 Wn.2d 306, 474 P.2d 274 (1970); Nye & Nissen v. United States, 336 U.S. 613, 619, 93 L.Ed. 919, 69 S.Ct. 766 (1949). Mere knowledge or physical presence at the scene of a crime neither constitutes a crime nor will it support a charge of aiding and abetting a crime. State v. Gladstone, supra; State v. Dalton, 65 Wash. 663, 118 P. 829 (1911).

In re the Welfare of Wilson, 91 Wn.2d 487, 491-92, 588 P.2d 1161 (1979). Thus, without some evidence beyond his potential knowledge of Ms. Mullen's acts, the State did not establish Mr.

Dean committed either a theft or was engaged in a conspiracy to commit a theft.

c. The Court must dismiss Mr. Dean's convictions. The absence of proof beyond a reasonable doubt of an element requires dismissal of the conviction and charge. Jackson, 443 U.S. at 319; State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). The Fifth Amendment's Double Jeopardy Clause bars retrial of a case, such as this, where the State fails to prove an element. North Carolina v. Pearce, 395 U.S. 711, 717, 89 S.Ct. 2072, 23 L.Ed. 2d 656 (1969), reversed on other grounds, Alabama v. Smith, 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989). Because the State failed to prove Mr. Dean committed either a theft or a conspiracy to commit theft, the Court must reverse Mr. Dean's convictions and dismiss the charges.

4. MR. REKDAL IMPROPERLY COMMENTED ON MR. DEAN'S RIGHT TO REMAIN SILENT AND SHIFTED THE BURDEN OF PROOF.

a. The State elicited testimony relating to Mr. Dean right to remain silent and the State's burden of proof. During direct examination of Mr. Rekdal, the prosecutor asked him to explain how when preparing his summaries he made the decision to assign questionable activity to either Mr. Dean or Ms. Mullen. 1/26/06 RP

112. Mr. Rekdal explained he simply categorized the activity based upon the name on the account in which it occurred without knowing who had actually benefited from a given transaction. 1/26/06 RP 112-13. After that explanation, the following occurred:

> Prosecutor: Who would know?
>
> Mr. Rekdal: You'd have to talk to the two of them.

1/26/06 RP 113. Both defendants immediately objected and requested a mistrial. 1/26/06 RP 113-14.

The prosecutor initially responded that because Mr. Rekdal was neither a police office nor agent of the State, his comments could not be construed as violative of any constitutional right. 1/27/06 RP 15. The prosecutor also claimed the answer was not responsive to the questions asked. 1/26/06 RP 115.

The trial court, while agreeing the comment was improper, denied the defendants' request for a mistrial concluding Mr. Rekdal was not an agent of the State and that his answer was unintentional. 1/27/06 RP 28-29.

b. The State may not elicit testimony commenting on a defendant's right to remain silent. The Fifth Amendment to the United States Constitution provides, in relevant part, a person shall

not "be compelled in any criminal case to be a witness against himself." This provision applies to states through the Fourteenth Amendment. Malloy v. Hogan, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed. 2d 653 (1964).

At trial, the right against self-incrimination prohibits the State from forcing the defendant to testify. Miranda v. Arizona, 384 U.S. 436, 461, 86 S.Ct. 1602, 1633, 16 L.Ed. 2d 694 (1966); State v. Foster, 91 Wn.2d 466, 473, 589 P.2d 789 (1979). Additionally, the State violates the right by eliciting "comments from witnesses or mak[ing] closing arguments relating to a defendant's silence to infer guilt from such silence. State v. Easter, 130 Wn.2d 228, 236, 922 P.2d 1285 (1996).

> As the United States Supreme Court said in Miranda, "the prosecution may not . . . use at trial the fact [the defendant] stood mute or claimed his privilege in the face of accusation." Miranda, 384 U.S. at 468 n.37. The purpose of this rule is plain. An accused's Fifth Amendment right to silence can be circumvented by the State "just as effectively by questioning the arresting officer or commenting in closing argument as by questioning defendant himself." State v. Fricks, 91 Wn.2d 391, 396, 588 P.2d 1328 (1979).

Easter, 130 Wn.2d at 236.

c. Mr. Rekdal's comments violated Mr. Dean's Fifth Amendment Right. The trial court denied the mistrial motion

concluding Mr. Rekdal was not an agent of the State. 1/27/06 RP 27. The court also concluded the testimony was "unfortunate" and "improper" but not an intentional comment on Mr. Dean's constitutional right. 1/27/06 RP 28. The court was wrong in each respect.

First, Easter does not limit its analysis to police witnesses. Instead Easter establishes a defendant's Fifth Amendment rights are violated if the prosecutor elicits "comments from [a] witness[] . . . relating to a defendant's silence to infer guilt from such silence." Easter, 130 Wn.2d at 236. This is precisely what occurred here. Moreover, as discussed at length above, Mr. Rekdal was in all respects the equivalent of a police officer in this case, as he was the principal investigator.

Second, Mr. Rekdal's comments were not limited to suggesting Ms. Mullen, the person responsible for making the erroneous entries, knew where the proceeds went. Such limited comments could arguably be said to relate to Ms. Mullen's knowledge derived from her job as comptroller as opposed to knowledge derived from her criminal acts. However, by referring to Mr. Dean as well, the only inference to be drawn is that Mr. Dean knew where the money went gained solely through his alleged

criminal acts. Faced with his own inability to determine whether Mr. Dean benefited from any of the mispostings, Mr. Rekdal's comments improperly turned the focus to Mr. Dean to explain he had not. Mr. Rekdal's comment were indeed improper comments on Mr. Dean's rights.

d. The court must reverse Mr. Dean's convictions.

The denial of a mistrial is examined for an abuse of discretion. State v. Lewis, 130 Wn.2d 700, 707, 927 P.2d 235 (1996). A court abuses its discretion where it uses an incorrect legal standard. In re the Welfare of B.R.S.H., 141 Wn.App. 39, 47, 169 P.2d 40 (2007).

The trial court mistakenly believed its conclusion that Mr. Rekdal was not an agent of the state was legally relevant and factually supportable. The court was wrong on both counts. So too was the court's belief that Mr. Rekdal's comments were merely "unfortunate." The court abused its discretion in denying the request for a mistrial.

5. THE TRIAL COURT DEPRIVED MR. DEAN OF EQUAL PROTECTION IN IMPOSING A DISPROPORTIONATELY HARSHER SENTENCE ON HIM AS COMPARED TO HIS MORE CULPABLE CO-DEFENDANT

a. The Equal Protection Clause requires similar treatment for similarly situated individuals. The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution "directs that 'all persons similarly circumstanced shall be treated alike.'" Plyler v. Doe, 457 U.S. 202, 216, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982) (citing F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415, 40 S.Ct. 560, 64 L.Ed.2d 989 (1920)). Where either a suspect class is involved or a fundamental right is at stake, a court must apply strict-scrutiny analysis to disparate treatment of similarly situated people. Doe, 457 U.S. at 216. Strict scrutiny requires the government show the disparate treatment is "precisely tailored to serve a compelling governmental interest." Id. at 217.

While equal protection analysis often focuses on legislative acts, "[a] denial of equal protection may occur when a valid law is administered in a manner that unjustly discriminates between similarly situated persons." Stone v. Chelan Cy. Sheriff's Dep't, 110 Wn.2d 806, 811, 756 P.2d 736 (1988); State v. Handley, 115

Wn.2d 275, 289, 796 P.2d 1266 (1990). In such a scenario, a defendant establishes his membership in a class where he demonstrates he was alleged to have engaged in similar conduct as a codefendant. Handley, 115 Wn.2d at 290; State v. Caffee, 117 Wn.App. 470, 480 n.3, 68 P.3d 1078 (2002), review denied, 149 Wn.2d 1023, cert. denied sub nom., Musgrave v. Washington, 540 U.S. 1059 (2003). Once a defendant establishes his membership in the class, a reviewing court must determine if there is a basis justifying disparate treatment of members of the class. Handley, 115 Wn.2d at 290.

b. Mr. Dean's sentence deprived him of equal protection in violation of the Fourteenth Amendment. The jury and trial court each found Ms. Mullen to be more culpable than Mr. Dean. While the jury convicted Ms. Mullen of criminal profiteering in addition to the theft and conspiracy charges, 2/7/06 RP 2, the trial court dismissed the profiteering charge against Mr. Dean at the close of the State's case but the jury convicted Ms. Mullen of that charge. 1/31/06 RP 54. In ruling on Mr. Dean's motion for a new trial, the court again recognized the disparity in proof of Ms. Mullen's acts as opposed to those of Mr. Dean. CP 1280. Finally at sentencing, the court stated:

> Now I happen to agree with [defense counsel] that it was clear to me . . . that one person benefited significantly more than the other in this case, and I think it is appropriate to distinguish between the two when it comes to sentencing.

12/11/06 RP 42. Even the prosecutor recognized "it's a little different for the two defendants because count three for Mr. Dean was dismissed." 12/11/006 RP 13.

The court imposed an exceptional sentence upon Mr. Dean which is six times greater than his standard range. CP 1285-1287, 12/11/06 RP 42. Despite the universal agreement regarding Mr. Mullen's substantially greater culpability, the court imposed only a 36 month exceptional sentence which is only 2.57 times greater than Ms. Mullen's standard range.[1] Despite the fact that she received 6 months more than Mr. Dean, relative to Ms. Mullen, Mr. Dean's sentence is more than twice as onerous, despite the recognition that she was substantially more culpable than he. In fact, had the court simply imposed the top end of each defendant's standard range, Ms. Mullen's sentence would have been 9 months longer than Mr. Dean's. Yet after an exceptional sentence was imposed that gap relative to each other, narrowed to only six months. Even had the court simply employed the same multiplier

[1] Ms. Mullen's offender score was three and her standard range was 12 month + 1 day to 14 months. 12/11/06 RP 14.

(2.57), an arguably indefensible position based on Ms. Mullen's greater culpability, Mr. Dean's sentence would only have been 12.85 months. In light of the trial court's repeated recognition of the relative weight of evidence, as well as the court's stated intent at sentencing there is no rational basis to justify the substantially harsher sentence imposed on Mr. Dean.

An examination of cases addressing similar equal protection claims further illustrate the absence of a rational basis for Mr. Dean's disproportionately harsher sentence. In State v. Turner, the court found a rational basis existed where: the codefendant pleaded guilty and cooperated with the prosecution at trial, the defendant had prior criminal offenses which the codefendant did not, and the defendant "was the more aggressive" participant in a robbery. 31 Wn.App. 843, 846-48, 644 P.2d 1224 (1982). Courts have also found a rational basis based upon rehabilitation potential and differences in the pleas the defendant's entered. State v. Connors, 98 Wn.App. 48, 52, 950 P.2d 519 (1998).

By contrast in State v. Clinton the court remanded the matter for the trial court to justify its disparate treatment of two defendants, concluding

> The evidence before the judge who sentenced Clinton was that both Clinton and Jones were involved in all three rape/burglary incidents, both pleaded guilty to all counts, and the State, pursuant to the respective plea agreements, recommended exceptional sentences in both cases. The State concedes in its appellate brief that "there is no real distinction between the roles of Clinton and Jones," and the court made no attempt to identify any distinctions between the two. The fact that different judges sentenced them can hardly be said to provide a "rational basis" for the disparity in the sentences they received.

48 Wn.App. 671, 680, 741 P.2d 52 (1987).

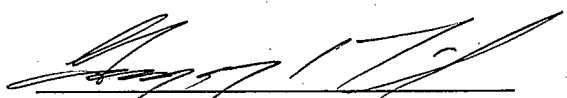
The differences which existed between Mr. Dean and Ms. Mullen weigh substantially in Mr. Dean's favor. Neither defendant had prior convictions but Ms. Mullen had three current offense while Mr. Dean had only two, supporting imposition of a harsher sentence on Ms. Mullen not Mr. Dean. The direct evidence of Ms. Mullen's criminal activity was substantial and established her misuse of hundreds of thousands of dollars The evidence of Mr. Dean's involvement was entirely circumstantial and did not establish his actual misuse of a penny of Frontier Ford's funds. The court summarized the evidence as follows: "I've got to be honest with you, I don't think it is something that jumps out at me." 1/31/06 RP 54.

To the extent there are meaningful distinctions between Mr. Dean and Ms. Mullen, they do not justify the disproportionately harsher sentence imposed on Mr. Dean.[2] This Court should remand the matter for resentencing.

F. CONCLUSION

For the reasons stated, this Court must reverse Mr. Dean's conviction and sentence.

Respectfully submitted after corrections to citation, this 23rd day of February, 2009.



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[2] The only remaining justification which could be posited for the disproportionate sentences would be gender. However, under the federal constitution gender-based distinctions must be narrowly drawn to serve a legitimate state interest beyond administrative convenience. See e.g. Schlesinger v. Ballard, 419 U.S. 498, 506-07; 95 S. Ct. 572, 42 L. Ed. 2d 610 (1975). The Washington Constitution is less tolerant of gender-based distinctions imposing "an absolute bar to sex discrimination subject to few exceptions (for actual physical differences and affirmative action programs designed to eliminate past discrimination). Anderson v. King County, 158 Wn.2d 1, 17, 138 P.3d 963 (2006) (citing Guard v. Jackson, 132 Wn.2d 660, 940 P.2d 642 (1997)). Under either standard a gender-based distinction between the sentences imposed here could not survive.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON, Respondent, v. KEVIN DEAN, Appellant.	)	NO. 59389-7-I

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 23RD DAY OF FEBRUARY, 2009, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT (WITH CORRECTED CITATION TO CLERK'S PAPERS)** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 23RD DAY OF FEBRUARY, 2009.

X_____

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